IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF OKLAHOMA

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IN RE: BROILER CHICKEN GROWER ANTITRUST LITIGATION (NO. II)

_____

HAFF POULTRY, INC., et al.,)
)
Plaintiffs,)
)
vs.) Case No. 20-MD-2977-RJS-CMR
)
TYSON FOODS, INC., et al.,)
)
Defendants.)

TRANSCRIPT OF PROCEEDINGS

JULY 14, 2023

BEFORE THE HONORABLE ROBERT J. SHELBY

UNITED STATES DISTRICT JUDGE

MOTION HEARING - VOLUME II

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PROCEEDINGS

JULY 14, 2023:

THE COURT: Good morning and welcome back, everyone.

We'll go back on the record in Case No. 6:20-MD-2977, our In Re: Broiler Chicken Grower Antitrust Litigation and constituent cases.

I don't think there's a need for us to make appearances. I think we have the same counsel we had yesterday. Both sides are nodding. Some of you have changed some seats. I anticipate we may hear from others of you today.

As a lawyer, I can't think of a time that I didn't walk out of a deposition or hearing and think, shit, I wish I had said whatever. So in five minutes or less, what did you mean to say yesterday that you didn't get out in the course of our discussion, if anything?

Mr. Torres, anything you want to add?

MR. TORRES: No, Your Honor. The only --

THE COURT: Just seated by the mic is good. Thanks.

MR. TORRES: Oh, excuse me. Sure.

To summarize in terms of the key issue, it's really whether you can boil this down to a battle of the experts or whether the experts that have been propounded

really have failed to fundamentally proffer and provide expert opinions that are reliable and that are relevant to the case. And that based on that standard, they are able to show that it really is something that goes to the fundamental nature of their claim. And it's the nexus between those, because it's not just a battle of the experts, it's essentially they have a requirement to show that and proffer evidence. And these cases that have excluded Dr. Singer, have basically applied this principle that there is a level of unreliability that has to be established for us to prevail, and we believe we've submitted sufficient evidence to demonstrate that, Your Honor.

THE COURT: I appreciate that. Thank you. I think that came out in your argument yesterday.

Anything from the plaintiffs that we missed yesterday?

MR. WALKER: I don't think so, Your Honor. You mentioned yesterday a footnote in the Pilgrim's class opposition that I think had some nexus with Dr. Singer's reports. I can address that today when we talk about class or if you want to address it now, I'm happy to do that.

THE COURT: We can just take it up then when we're talking about class. That's fine. All right. Well, I appreciate that.

I think in just keeping with our practice, we're taking up the class certification motion this morning. It's the plaintiffs' motion. Plaintiff has the burden. Why don't we invite the plaintiffs to take the podium first, if you would like, Ms. Coolidge.

MS. COOLIDGE: Thank you, Your Honor.

Plaintiffs ask the Court to certify a class of similarly situated growers of broiler chickens, appoint plaintiffs as class representatives, and appoint Berger Montague and Hausfeld as class counsel.

Plaintiffs in the class satisfy each of the elements of Rule 23(a). The class is sufficiently numerous. There are questions of law or fact common to the class. Plaintiffs' claims are typical of the claims of the class members, and the plaintiffs have protected and will continue to protect the interest of the class.

The class also satisfies Rule 23(b)(3) because common issues predominate over any individualized issues. And class treatment for the claims of the thousands of class members is superior to individual adjudication for each.

I expect that Mr. Walker will be up here much longer than I today, as he will address the predominance issues under Rule 23(b)(3) and commonality, which is subsumed in the discussion of predominance.

Mr. Madden will address any issues relating to

purported class waiver and arbitration clauses. And I am here to briefly get out of the way the contested issues of Rule 23(a) of typicality and adequacy.

The typicality prong of Rule 23(a) is met when class members are at risk of being subjected to the same harmful practices, and thus their claims are based on the same legal theory. This is the doctrine elucidated by the Tenth Circuit in *DG ex rel. Stricklin v. Devaughn*, which Pilgrim's has not distinguished here.

The Tenth Circuit has also held that every member of the class does not need to share a factual situation identical to that of the named plaintiff in order to satisfy the typicality prong. That's in *Colo. Cross Disability Coal. v. Abercrombie & Fitch.*

Pilgrim's argues that the named plaintiffs are not typical because they did not actually try to switch integrators. But our theory of harm is not that every grower would have switched, but that -- in a competitive world -- but that no-poach agreements cause pay suppression by limiting mobility and making it less likely that integrators have to raise pay in order to maintain an adequate base of growers.

It is not true that the named plaintiffs didn't try to switch integrators. For example, Mr. Walters testified that he tried to switch from Sanderson to Mar-Jac

and then Wayne, but was unable to do so. That's in Exhibit 46 of our reply brief.

And when Mr. Upchurch was asked whether he remembered any growers working for Tyson's Ashland complex that left to work with another integrator, he said no, and when asked why, he said, "Well, it was pretty much agreed with everyone that your growers stay out of my area, so no one could -- no one could go. I mean, we were stuck." That's in our Exhibit 9.

But, more importantly, Pilgrim's argument is inconsistent with the law on typicality. In *DG ex rel. Stricklin*, the Tenth Circuit upheld certification of a class of all foster children within the custody of the Oklahoma Commission for Human Services. The defendants argued that the named plaintiffs who had been abused were not typical of the class as a whole, in which only 1.2 percent of children had been abused.

The Tenth Circuit noted that plaintiffs' claims were that the defendants' policies and procedures left all foster children at risk of abuse of neglect. That risk constituted an injury to every class member, and thus the named plaintiffs' claims were typical of the rest of the class.

Similarly here, the defendants' policies and procedures, in participating in the no-poach agreement and

the information sharing agreement, not only put every class member at risk of lower pay, but we have shown actually had the effect of suppressing pay for all class members.

For these reasons, the named plaintiffs are typical of the rest of the class because they were impacted whether or not they personally tried to switch integrators.

You see this same conclusion in the vast majority of no-poach cases around the country. *In re Geisinger Health & Evangelical Community Hospital Healthcare Workers Antitrust Litigation* from Pennsylvania rejected the claim name that a no-poach plaintiff cannot show injury if they do not allege that they sought work at a co-conspirator.

And in the *In re High-Tech Employee Antitrust Litigation*, the court held, in the Northern District of California, "That no-poach agreements impact all employees, not just those who would have received cold calls but for the anti-solicitation agreement and regardless of geography or job title."

That court also noted that in antitrust cases typicality usually will be established by plaintiffs and all class members alleging the same antitrust violations by defendants.

In this case, all class members, regardless of their individual integrators, allege the same injuries arising from common conduct, suppression of compensation due

to defendants' no-poach and information sharing agreements.

Plaintiffs also satisfied the adequacy prong of Rule 23(a), because the named plaintiffs have no conflicts of interest with the class, and the named plaintiffs have and will continue to prosecute the case vigorously in the interest of the class.

Across the two final approval hearings so far in this action, this Court has already twice held that plaintiffs have skillfully represented the class and the settlement classes.

Pilgrim's argues that the named plaintiffs are not adequate class representatives because they lack personal knowledge about the case, but that is untrue and irrelevant under Rule 23(a)'s adequacy determination, which focuses on an absence of conflicts and vigorous prosecution.

To briefly take the allegation that plaintiffs are not knowledgeable, in this case not only are each of the named plaintiffs steeped in the business of broiler growing for more than a decade, but when the defendants quizzed some of the named plaintiffs, including Mr. Weaver and Ms. McEntire, on things like the names of the defendants and co-conspirators, their duties as class representatives, and their understanding of the case, they gave accurate and full responses, which Pilgrim's does not dispute.

Pilgrim's claims that Mr. Mason testified that he

was unaware of the facts other than that from information provided by counsel, but that is the opposite of what he testified. He said it was "common knowledge, kind of, or scuttlebutt, whatever you want to call it, amongst growers, that it was hard to switch integrators."

Pilgrim's hasn't actually cited to any testimony demonstrating a lack of understanding of the case. What Pilgrim's does cite to is testimony that the class representatives deferred to counsel on matters of case strategy, which is undoubtedly appropriate, particularly here, where the named plaintiffs are barred under the protective order from seeing the evidence produced by the defendants and third parties.

Plaintiffs are farmers, not economists or antitrust litigators. Pilgrim's critique is like criticizing a medical patient for not advising the surgeon how to perform a medical procedure.

"The law is clear that a plaintiff is adequate, even where his knowledge of collusively set rates and of his claims came solely from his attorney and from reviewing the complaints." That's a quote from *In re Universal Services Fund Telephone Billing Practices Litigation* from the District of Kansas.

To an element that is relevant under the adequacy inquiry of Rule 23(a), plaintiffs have vigorously prosecuted

the case, devoting dozens of hours, including assisting with the complaint, preparing interrogatory responses, producing documents, advising on settlements, attending hearings, and preparing for depositions.

Finally, Pilgrim's argues that named plaintiffs who grew broilers for only part of the class period have a conflict with those who grew longer, but that is not true. It doesn't matter which years the plaintiffs were growing during the class period. All plaintiffs have the same interests as other class members in proving that they were harmed by the defendants' conduct and in maximizing the class recovery.

And Pilgrim's cites no support for its argument that different time periods creates a conflict. And, frankly, if it did create a conflict, then no price-fixing case could ever be certified, because it is extremely common for a customer to purchase a price-fixed product just once or twice during a multiyear price-fixing conspiracy, and courts do not hold that creates a conflict.

For these reasons, the named plaintiffs here have more than met the adequacy prong of Rule 23(a).

THE COURT: Thank you, Ms. Coolidge.

I'm going to propose that we break this into smaller bites as the plaintiffs, I think, have done in their presentations and hear from the defendants with respect to

each as we move forward, so I appreciate that.

Mr. Kasowitz, I think you're on deck today. Is there anything you would like to address with respect to typicality and adequacy?

MR. KASOWITZ: Yes, Your Honor, just quickly.

I think that the -- on the typicality point, I think the real point here is that of these eight named plaintiffs, five of them, Butler, Upchurch, Weaver, McEntire, and McEntire were located in areas where there was only one integrator, one chicken company, and -- which means that they couldn't have been subject to a no-poach agreement, which is demonstrably different from those putative members of the class who were in areas where there were -- according to these allegations, according to the plaintiffs' allegations, where there was competition and where there were local no-poaches.

So I think that that is -- you know, from our point of view, the real issue about both typicality and adequacy from the plaintiffs' point of view, and I think it's a real problem for them. It's an issue that's going to come up more when we talk about (b)(3), but for our purposes right now, it's really the singular issue on typicality and adequacy.

THE COURT: But doesn't that argument recast the plaintiffs' theory in the case? I mean, the harm here is

not that an integrator -- excuse me -- a grower couldn't change; it's the economic consequence of the no-poach agreement. So even if I'm an integrator in an area where I'm geographically bound, I'm still damaged, if we accept Dr. Singer's opinions, which will be the hypothetical that we'll be batting back and forth today. But if we accept Dr. Singer's opinions, then the damages are still present, even for those who are geographically bound and couldn't move.

MR. KASOWITZ: Even if you accept the opinion, Your Honor -- and we don't. It goes without saying.

THE COURT: That was clear.

MR. KASOWITZ: But even -- even if you do, there's a significant -- no one can dispute -- and the plaintiffs can't and don't dispute -- that there is a difference in impact in a situation where you have one integrator in a particular town or a particular local 45, 50-square mile area, where there's no competition, and there's no no-poach issue -- no no-poach issue -- no one is keeping that named plaintiff from trying to go someplace else; right? Okay. So that's clear. It's as clear as a bell as to whether or not there's a problem and an impact at this level.

Dr. Singer's argument that there's some kind of amorphous -- strike that. I don't -- that there's some kind of impact in some way, on that same -- on that same grower,

who's in that area, from no-poach agreements in Delmarva -- which, if we're in Nacogdoches now, okay, where the -- where the couple was, the McEntires, and then you go to Delmarva, which is hundreds and hundreds of miles away, I mean -- sure, he says that, but just common-sense rationality, which the Court needs to apply, there's clearly a difference in impact, has to be. And Dr. Singer can't deny that.

So we'll get into those issues when we deal with (b)(3), but there can't be any dispute that those five -- that those five growers, those five putative named plaintiffs, are situated differently than folks who are in areas where there are more than one integrator and there is more competition, I think.

THE COURT: I understand.

MR. KASOWITZ: Thanks, Your Honor.

THE COURT: Thank you.

MR. KASOWITZ: Thanks, Your Honor.

THE COURT: Thank you.

Mr. Walker.

MR. WALKER: Thank you, Your Honor.

Again, this is Dan Walker from Berger Montague on behalf of the plaintiffs.

I will be addressing the predominance requirements. I guess just off the bat, I don't think there is -- there's really much engagement on the argument that if

predominance is satisfied, commonality is valid. Commonality requires a single issue common among the class members. We say that common issues predominate among the entire class. So I'll just in jump in on predominance.

Plaintiffs have put forward ample evidence, all common to the class, capable of proving each of the elements of their claims at trial by a preponderance of the evidence. This is more than enough to satisfy the predominance requirement of Rule 23(b)(3).

Notably, plaintiffs are not required to prove the merits of their claims at the class certification stage, rather plaintiffs must simply show that there are "common questions that are capable of the class-wide proof." And that's from the *Urethane* opinion in the Tenth Circuit.

And as the Tenth Circuit recently said in *Black,* "Common issues are those for which the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized class-wide proof."

And plaintiffs are only required to demonstrate the common issues predominate as to the case as a whole, not as to each element of each claim, although plaintiffs do, we believe, demonstrate that common issues predominate as to each element. And that comes from *Amgen,* the Supreme Court case. *Black* also made that point in the Tenth Circuit.

And, further, plaintiffs are confident about the

strengths of the merits issues. Discovery has revealed an enormous amount of evidence that we think proves the existence of the conspiracy, proves impact from the conspiracy, and proves class-wide impact and aggregate damages.

But, importantly, at the class -- at the class certification stage, plaintiffs don't need to prove that they'll ultimately win on any issue. Plaintiffs need to only show that the issue could be resolved for the whole class, win or lose, in one fell swoop. That's from the *Amgen* case. *Amgen* calls it a fatal similarity. If, for example, proof fails as to impact for all class members, that's a class-wide issue. That's not -- it doesn't devolve.

And, finally, Dr. Singer offered analyses and opinions that all or nearly all class members were injured by the conspiracy, that there was market power in the relevant markets, opinions that the evidence is consistent with the conspiracies, and evidence as to aggregate damages. If the Court finds that Dr. Singer's analyses are reliable and admissible evidence, then that evidence is, by definition, class-wide evidence capable of proving elements of plaintiffs' claims.

THE COURT: And how do the plaintiffs establish predominance if Dr. Singer's opinions are not received?

MR. WALKER: Well, let's take each of the elements; right? So there's predominance as to the existence of the conspiracy. 90 percent of the trial is going to be about whether the conspiracy took place, how it took place, who participated in it. You know, all the -- all the arguments that were presented against Dr. Singer's views of the conspiracy by the defendants, all of that is class-wide evidence, and the existence of the conspiracy is a class-wide issue; right? So that evidence doesn't need to come in through Dr. Singer; right? We are going to be playing, you know, days of -- witnesses testifying at trial and through deposition clips, all the documents that are going to come in. We can establish the existence of the conspiracy regardless of Dr. Singer's opinions, although we think his opinions on the conspiracy are reliable.

THE COURT: What do the plaintiffs maintain is the conspiracy that needs to be proven at trial now? Is it -- is it -- the pleading says, I think, 21 co-conspirators. We have settlements with some integrators. Is the conspiracy question for trial now whether the plaintiff can prove that Pilgrim's conspired with one or more other integrators to suppress grower wages? Or is the proof what you plead, 21 co-conspirators in a nationwide conspiracy?

MR. WALKER: I think -- those are two questions. I think one is yes to your first question, but I think we

will prove at trial that there was a conspiracy involving all the integrators, all the alleged co-conspirators.

THE COURT: On the jury verdict form, we'll just be asking whether the jury finds that Pilgrim's conspired --

MR. WALKER: Yes.

THE COURT: -- with one or more other -- is that right?

MR. WALKER: Yes. Sorry. I didn't mean to talk over you. Yes, that's correct. I think the jury verdict form will be was -- you know, did Pilgrim's conspire? Did it cause harm? It's not going to say class-wide harm because that's not on jury verdict forms that I've seen. And then a blank for the aggregate damages figure.

THE COURT: So that was just the first part, though, without Dr. Singer's opinions. How else do the plaintiffs certify a class if the Court does not receive Dr. Singer's opinions?

MR. WALKER: Well, I think there's two questions. One is -- and I believe *Beltran* from the District of Colorado makes this point. Proof of just a conspiracy is enough to satisfy the predominance requirement of 23(b)(3), because the question is does -- do class-wide issues predominate to the case as a whole such that trial is not going to devolve into minitrials. And there's, you know, plenty of case law out there that proof of predominance of

just a conspiracy could satisfy the predominance requirement under 23(b)(3) on its own.

But if your question is how do we show class-wide impact without Dr. Singer's -- well, how do we show class-wide impact and aggregate damages without Dr. Singer's analyses. I don't think we can show aggregate damages without Dr. Singer's estimations. And proof of class-wide impact, we would have to go on all the record evidence that is part of Dr. Singer's opinions about how -- you know, the economic theory behind how -- how agreements like this, the alleged conduct can cause harm, and how -- and how in the context of this market, that can cause harm.

But to your point, I think, yes, our -- we rely very heavily on Dr. Singer's analyses for proof of impact and aggregate damages.

THE COURT: Different courts seem to take different approaches. It seems to me that the suggested best course in the Tenth Circuit for a trial court is to identify the issues, identify those issues as common or not common, and then there's a qualitative sort of assessment about what are the most important questions. I think -- it seems like courts engage in that analysis. And so let me just see if I have this right. Even without Dr. Singer, then the plaintiffs argue, I think -- you maintain that the common question about the existence and scope and duration

of the conspiracy still overwhelms whatever individualized questions there might be about impact and damages. Is that your -- have I said your position correctly?

MR. WALKER: I believe you have. And I would say if that came to pass, there's also the question of -- and I believe this was the premise of *Black* -- that you certify an issue class and then have -- and then you deal with damages in another way. But, of course, in *Black,* the issue there was the damages theory didn't -- didn't match up with the calculations done, which is not the issue here. But, in any event, that's -- that's, you know, one avenue there as well.

THE COURT: How could any individual grower establish antitrust impact without Dr. Singer's baseline but-for transaction costs? So, I mean -- you'd have to measure each -- each grower would have to measure its impact against a no-poach or information sharing agreement without a benchmark. Could that be done?

MR. WALKER: Well, I think you would have to -- you would have to go on the theory of how -- you know, the economic theory and the facts as applied to that, as to how this conduct could suppress pay below the competitive levels. But, you know, frankly, I don't -- I think -- I think it would be a very difficult -- a very difficult case to prove impact without the economic analysis.

THE COURT: I don't mean to oversimplify this.

It's a -- we're engaged in a rigorous analysis, but it's hard for me to escape the conclusion that predominance rises and falls with Dr. Singer's testimony.

MR. WALKER: Well, again, I would say predominance to the case -- I mean, our view is predominance to the case as a whole.

THE COURT: I probably said that wrong. I don't know if I mean predominance. Well, I guess -- my thinking about this continues to evolve.

Go ahead. I'm listening.

MR. WALKER: Okay. And I'm -- just to finish my thought, in case -- predominance, we think is satisfied by predominant -- by the class-wide proof of the conspiracy.

THE COURT: Right.

MR. WALKER: Which is not going to involve Dr. Singer too much. I mean, he'll -- he'll testify at the end, but most of the trial is going to be consumed with the evidence of what took place in the marketplace.

THE COURT: Yeah. He's not going to be sponsoring evidence about a conspiracy. He'll be talking about what he read and how it informs his opinions, but he's not the sponsor of any evidence about a conspiracy.

MR. WALKER: Exactly. We're going to be spending days getting that evidence in -- into trial through all the usual methods.

THE COURT: But before we leave the conspiracy, you set out the evidence, I think, in your brief about what you think the evidence is of the overarching conspiracy, but will you summarize it in plain language? What is the -- what is the proof at trial of the overarching conspiracy?

MR. WALKER: The proof at trial of the overarching conspiracy is largely the proof of the constituent parts. It's -- but we do maintain that it -- it doesn't make sense to separate them out as if they were two completely separate operating conspiracies that --- that were not part of an overall scheme, in particular, because they go to the same effect. They were effectuated by the same people, at the same time.

THE COURT: But doesn't that approach conspiracy from the wrong side? I mean, I think the formation of a conspiracy is the intent of the co-conspirators to join in a common purpose. So looking at the effects and saying it makes sense to evaluate them as if they were together is a separate question than whether -- did Pilgrim's intend to join into a conspiracy with one or more other co-conspirators for the purpose of suppressing grower wages, through one or both of these vehicles? Is that not the way to think about conspiracy?

MR. WALKER: I would say it is, but the evidence of that is in the conduct of the -- of the participants in

the conspiracy; right? I mean -- we cited to the jury instructions on conspiracy, and I don't need to get into those now, but, you know, there's -- there's not this requirement that sort of seems to be the background of a lot of Pilgrim's arguments, that you need to show, you know, every member of the conspiracy was operating in lockstep; right? You prove conspiracies through direct evidence to some degree and through circumstantial evidence. And the question is can you prove this intent that you're talking about through this direct and circumstantial evidence. And we think, in both cases, it's the same companies, the same people, in many cases, operating together toward this common goal of suppressing grower pay. They did it through a no-poach and they did it through an information sharing, and each of those elements support each other; right? I mean, that's -- we have testimony.

I asked one of Pilgrim's witnesses, "Why would you be giving all this information to your competitor that identifies who your best growers are? Aren't you worried that they're going to go and take those growers?"

And he said, "Oh, no, we don't go after each other's growers."

Like that kind of evidence is the kind of evidence that's going to show you how these things lock together. There's other evidence like that. I don't want to get into,

you know, all the granular bits of the evidence, but that's the -- that's the -- that sort of logic behind it.

THE COURT: Together with Dr. Singer's testimony then, it's just basic economic principles that it's not in the best interest of an entity to share this kind of information with your competitors unless you have these other assurances. That's integral to tie in those two, is it?

MR. WALKER: I think it will help the jury understand how those things tie together, but I don't think we -- sorry for the double negative. I don't think we can't make that point without Dr. Singer testifying.

But I do think he -- he can seat it in the literature of the economics profession and that sort of thing, but I don't think it's necessary.

THE COURT: How do you think -- so as part of a rigorous analysis where I'm required to pierce the complaint and evaluate the record -- this is a conceptual question. And the courts confront this in conspiracy cases, but I haven't read a court sort of showing their work. This seems to be tricky in a conspiracy case, because so much of it relies on inferences that could reasonably be drawn from the evidence because there's so rarely direct evidence of intent. So how do you think -- how do you think I approach that in the framework of the law, when we look at the

overarching conspiracy for certification here?

And I'm mindful of -- and Mr. Kasowitz and I are going to talk about this. This seems a really important piece of this in this case. The invocation of Fifth Amendment supports a jury instruction, an adverse inference jury instruction. That seems -- only the jury can decide in the context of the record as a whole whether to apply that inference or not. That will be a jury question. But it seems -- it seems highly relevant when we consider the -- I guess, the constellation of facts that might support an overarching conspiracy at this stage, or am I just hung up on the wrong thing at Rule 23?

MR. WALKER: Well, I think at Rule 23, the question is are there common questions that generate common answers. And the existence of the conspiracy is a common question for the class, and the -- we will put forth our proof, which we think is quite strong, that answers that there was a conspiracy. That you can -- that a jury can conclude that it's more likely than not the conspiracy that we allege happened.

But if the jury decides they don't go with our proof, then the whole class loses; right? That's the *Amgen's* "fatal similarity," to use a quote from *Amgen*.

That's what *Black* talks about with impact; right? That it's -- that there's all this rebuttal evidence, and

that doesn't mean that this devolves into a thousand minitrials. What it means is if the jury doesn't believe that our evidence shows it's a conspiracy, we all lose as a class.

And, you know, sort of, to complete the circle there, if we brought this case on behalf of any individual, we would be using the same evidence of a conspiracy. It's not like it changes when we bring it on behalf of a class.

And so I would say as to the sort of meta-level of, you know, how Dr. Singer's analysis factors in here is -- under *Tyson*, the court is not to resolve the battle of the experts at class. And *Black* quotes *Tyson* at 6 -- 69 F.4th at 1185, "persuasiveness is, in general, a matter for the jury and not grounds for denying class certification unless no reasonable juror could have believed plaintiffs evidence of an essential element of their claim."

And so, you know, as we talked about yesterday, we believe Dr. Singer has offered reliable, admissible evidence; right? His opinions are that -- you know, that the evidence is consistent with a conspiracy, that there is wide -- more than widespread impact. And we think that just by definition, that is class-wide evidence capable of proving the essential elements of the claim.

THE COURT: The more rigorous standard to apply, it seems to me, to Dr. Singer's testimony, is the standard

we were talking about yesterday. It would be gatekeeping function under Rule 702 and *Daubert*. Surely, if Dr. Singer's opinions clear that hurdle, they're -- it seems, by definition, they've cleared the relevance hurdle -- the persuasiveness issue for trial under Rule 23(b).

MR. WALKER: I think that's right, Your Honor. I put a -- you know, to make sure I understand your point, I don't think there is daylight between reliability and admissibility and what *Tyson* says is, you know, the no reasonable juror standard.

THE COURT: And *Black*.

MR. WALKER: And *Black*.

THE COURT: Right. Okay.

MR. WALKER: So I don't want to belabor the common evidence too much because we talked a lot about it yesterday. But the plaintiffs have put forward, both through Dr. Singer -- but, also, you know, there's an enormous amount of underlying evidence in Dr. Singer's report and more that will come in at trial -- to establish each of the elements of plaintiffs' claims.

There is -- as to the evidence of the conspiracy, there's, you know, the industry-wide evidence about the conduciveness to cartelization, and, then, of course, all of the evidence of the behavior of the alleged co-conspirators, both with respect to the information sharing and with the

no-poach. There is -- there is evidence of the co-conspirators using the information they shared in connection with setting pay, and, then, of course, all the direct evidence of the no-poach and the circumstantial evidence of the no-poach and the conduct of these parties in conformance with the no-poach agreement.

Pilgrim's Pride's primary argument in their briefs, as far as I can tell, on the conspiracy is that there is all this other evidence that the conspiracy didn't exist or evidence inconsistent with the conspiracy.

And, again, to keep going back to *Black* and *Tyson* and *Amgen,* those are fatal similarities; right? If they convince the jury that the spaghetti charts mean that there was no conspiracy, then they win on that -- on that key element of the claim, but it's class-wide. There's no, then, okay, let's have a thousand minitrials for each of the class members.

And, more importantly, what matters for class cert here is not who's right on that, as we talked about. The question is, can a jury, in light of all the evidence, find more likely than not, having put forward a prima facie showing from which a jury -- capable of proving more likely than not an element of your case.

THE COURT: Is that right? Is that an accurate statement of the standard I'm required now to apply under

the rigorous analysis? It's not just a -- it's not like a 12(b) standard. Could a jury look at -- could any reasonable jury look at this evidence and conclude it's sufficient. There is something more here, something more robust. I think you have a preponderance of the evidence standard you need to meet at this stage, don't you?

MR. WALKER: The standard on class, from *Urethane*, is have plaintiffs put forward evidence capable of proving their case on a class-wide basis. And for each of the elements, then you ask are there common questions that will create common answers. And the courts -- if you're asking about the rigorous analysis, the rigorous analysis is to answer that question, can each of the elements under Rule 23(b)(3) be satisfied with -- are they capable of being satisfied with class-wide proof?

THE COURT: And do you have admissible evidence that would establish that at trial?

MR. WALKER: Correct. And then just to circle back to *Beltran.* As we said, the courts -- this is to quote *Beltran*. "Courts often find that whether a conspiracy exists is a common question that predominates over other issues and has the effect of satisfying Rule 12(b)(3)." And this is why the Supreme Court said in *Amchem*, "Predominance is a test readily met in certain cases alleging violations of the antitrust laws." It's a type of case that is

conducive to class-wide proof because so much of it focuses on proof of the conspiracy, which is a class-wide issue involving class-wide evidence.

Again --

THE COURT: Intuitively, I understand why some courts have said that, and I don't see -- I don't remember a case where, I think, a district court was reversed for relying on that. But the clear trend in the case law in my view is to -- is to more carefully scrutinize each of the elements. If we were thinking about an antitrust claim, a Section 1 claim with three elements of proof, seems like I'm going out on a limb if I just say, well, there's pretty strong evidence about one and so I'm satisfied. I'm not even really going to carefully consider the other two. I don't think you would want to be defending that on appeal.

MR. WALKER: Luckily, I don't think we're in that -- we're in that category, so I don't want to engage too much with the speculation. But I will say there is the issue, class issue. I mean, the *Black* case did find that the damages because of their -- their modeling problems didn't satisfy one element and certified the class. But your point is taken, Your Honor, and I think we show for each element that there is class-wide proof capable of -- that there's class-wide evidence capable of common proof.

Again, there's a question of monopsony power in

the relevant market. If that becomes an issue we need to prove at trial, we have evidence, class-wide evidence, in the form of Dr. Singer's analyses, which itself relies on an enormous amount of record evidence in this case, in addition to econometric analysis.

And as in *Black,* that's a class-wide issue that is common for all plaintiffs. There's no plaintiff that we would bring a case for where if we had to show monopsony power, we wouldn't use the same evidence; right? And if the jury finds that they're not convinced -- if we have to prove it and they're not convinced, all plaintiffs lose on that issue. It's a fatal similarity. The case doesn't devolve into a thousand minitrials.

And then, of course, there's the impact element. As a big-picture point, this is a nationwide conspiracy with conduct that is substantially similar across the country, directed at harming plaintiffs that are similarly situated in the relevant ways. They are all contract growers, all getting paid in cents per pound. Under the tournament system, the factors that they're evaluated under the tournament system, the objective factors, which are controlled for in Dr. Singer's regressions, are all objective factors that are largely or entirely the same across the country. And the conduct in the information sharing and the no-poach, we have evidence that this is a

nationwide conspiracy.

And as many courts have held, this sort of nationwide character is such that you would expect there to be impact on a class-wide basis. There's no reason, in light of all the evidence, that you would expect impact to be different in pockets. And there's this -- there's the *Urethanes* quote that's often used where -- in a case like that, where there's nationwide elements, you -- there's an inference of class-wide impact.

And *Black* comes back and says, well, we're limiting that to its facts because we don't think it applies in every antitrust case, but there are cases where a jury, a reasonable jury, could conclude from certain nationwide elements that there is nationwide impact.

And so I don't think *Black* got rid of this idea that you can infer from certain nationwide elements of the case that there is class-wide impact. I think what it said was in every antitrust case, you can't infer or assume or there's no rebuttable presumption of class-wide impact, but with certain nationwide characteristics, nationwide impact can be inferred just from those characteristics.

THE COURT: What inferences could a jury find here that would support that? Is it that -- is one of the key inferences that there's no reason for integrators from Arkansas and Kansas to enter into this agreement, if the

agreement wasn't going to have a mutually beneficial effect for the integrators?

MR. WALKER: I think that is an inference that the jury could draw. I think that the jury could draw inferences from the fact that they all engage in nationwide sharing of information, all received nationwide data, and use that data, as well as other direct communications of grower pay, in setting grower pay.

But in terms of the no-poach, I absolutely believe that that is an inference the jury could draw. There's also -- you know, unlike in *Urethanes*, there's no negotiation of grower pay here. Grower pay is set by, essentially, take-it-or-leave-it contracts. There is incredible similarities in operations among the co-conspirators here.

And unlike in *Urethanes*, these products are much more homogeneous. In *Urethanes,* you had a series of different commodity chemicals, and then you also had these custom-made chemicals that were made for individual plaintiffs, individual class members, that were custom-negotiated prices, and the court still said, well, you look at -- there's certain basic nationwide facts from which impact can be inferred. And you don't have to -- and, of course, in *Urethanes,* they went beyond that, just like we do. There was all this econometric evidence showing nationwide impact. But I do think the inference is more

something -- I read *Urethanes* as saying a jury could infer from these facts that there was -- it was unlikely that any large number of class members escaped impact, if that makes sense.

But, of course, we have the class-wide evidence of impact in the form of Dr. Singer's reports. We obviously believe they're reliable and admissible, and we also then have Dr. Singer's analysis, as well as the record evidence, that the impact would be widespread, which we believe is all reliable and admissible evidence. And if those are admitted, then, by definition, I would say under *Tyson* and *Black*, there is -- there is class-wide evidence capable of proving common impact.

And Pilgrim's arguments are mainly, on impact, that there's counterevidence of impact; right? That there are parts of the country where things operate differently or even within complexes, there are differences.

But I think under *Black*, the response to that is, again, that is rebuttal evidence to plaintiffs' evidence that a jury will consider. And if the jury decides that plaintiffs can't prove impact, then they lose, they all lose. You're not going to then go into every single plaintiff and show -- you know, do some minitrial on impact. It's -- that's our evidence of impact. And if the jury doesn't accept it, then it's a fatal similarity. We lose in

one fell swoop. But that the persuasiveness of each side is not a matter for class certification, that's a matter for summary judgment or trial.

And then, finally, Dr. Singer -- oh, let me go to that footnote that you asked about yesterday. I think now is a good time to address that. I believe it's footnote 5 in Pilgrim's opposition. Is that the one you asked about, Your Honor?

THE COURT: Was it is footnote 3 or footnote 5? I don't remember. And I might have given you the wrong number.

MR. WALKER: It's -- well, I'm going to talk about footnote 5, and I hope that's the one you were asking about.

THE COURT: Great.

MR. WALKER: Pilgrim's says that Dr. Singer's analysis doesn't fit the theory, because we allege, as they say, an illegal scheme that suppressed the base pay amount. They say it's a base-pay conspiracy. That's not what we allege. That paragraph of the complaint that they're citing is talking about how the tethering of base pay through the tournament system is one of the elements of equity that proves class-wide impact. But if you look at the complaint, all throughout the complaint, it's referred to as a conspiracy to suppress grower compensation. And that's what Dr. Singer calculates is total grower compensation.

THE COURT: The former theory was the one, I think, advanced in *Wheeler*; is that right? That was the argument the plaintiffs made there, I think, was that the baseline pay was reduced. Or am I --

MR. WALKER: That's correct. They also, I think, alleged some things that were getting into the lost-profits area, or at least required looking at opportunity costs and that sort of thing, which we don't either. But you're right, that that was the -- that was the *Wheeler* case, which is different for lots of reasons.

So I just wanted to address that point in case that was what you were asking about yesterday.

And then so -- so, finally, we have class-wide evidence capable of proving aggregate damages. We have a theory. We have a calculation for if the entire overarching conspiracy, including the information sharing and the no-poach, is -- if the jury finds both, and that is captured by the information sharing model because the benchmarks there didn't participate in either the information sharing or the no-poach.

We have a model that looks specifically at the no-poach harm, which is the no-poach regression, because those Delmarva integrators were participating in the information sharing but not in the no-poach, and so we were able to isolate that harm.

And then if the jury finds that the no-poach didn't exist; right? If, at trial, the jury finds that, you know, no, there was no evidence of a no-poach, or at summary judgment, Your Honor finds there's no evidence of a no-poach, then you would look to the information sharing model, because the information sharing model then would -- because then there would be no, no-poach to control for, if that makes sense, Your Honor.

THE COURT: In addition to predominance, is that argument a response to the *Comcast* problem that was raised yesterday?

MR. WALKER: It is.

THE COURT: Right.

MR. WALKER: It is. There's no -- there's no plausible theory that is not accounted for in the aggregate damages modeling of Dr. Singer.

THE COURT: To summarize, you have competent evidence of damages no matter which box the jury -- which boxes the jury checks on the form?

MR. WALKER: That's correct.

THE COURT: Understood.

MR. WALKER: And it's class-wide, of course. And, in fact, I think the case law is clear that there is a much lower standard for -- for proving -- you know, for damages being variable for -- across the class because -- because

the amount of damages can vary. The fact of damages, the impact is one thing. The amount of damages often varies, and that's -- that's not a -- that's not a bar to class certification usually.

THE COURT: Many courts have said that.

MR. WALKER: Yes.

THE COURT: All right. Thank you, Mr. Walker.

MR. WALKER: All right. Thank you, Your Honor.

THE COURT: Mr. Kasowitz, predominance.

MR. KASOWITZ: Thanks, Your Honor.

I've got a little bit on this.

Years ago -- I graduated from law school in 1977, and the first case that I was assigned to as a first-year associate was an antitrust price-fixing case involving a client called Eagle Electric, which for folks who were in New York, if they traveled over the Queensboro Bridge, you'd see a big sign for Eagle Electric. And what they did was they made fuses and plugs and wiring devices and the like. And the allegations against them -- which were brought by -- not just by the government, but in an antitrust class action -- were the old-time, smoke-filled room.

A bunch of CEOs, high-level executives, in a particular industry, sitting around and marking up price books. And that got found out, and there were -- there were lots of legal consequences and folks went to jail, all of

that.

During three years of scorched earth discovery in this case Your Honor, 90 depositions, millions of pages of documents that have been produced, thousands of pages of exhibits and expert reports and the like, the plaintiffs have not come up -- contrary to what's been said -- and we're going to go through it in some detail -- but the plaintiffs have not come up with a scintilla of evidence that there was any smoke-filled room here.

And nor have they come up with a scintilla of evidence that there was any -- to coin a phrase that we've heard -- any overarching agreement among 21 companies, which operate 147 chicken production plants, to suppress the pay of each and every one of the 24,000-plus growers who do business in this country.

Nor, Your Honor, is there a shred of evidence that there were any directions or instructions or guidelines or even a single email, anywhere, from the CEOs or other high-level executives of these integrators, like we had in the *Eagle Electric* case, or from anyone else for that matter, talking about it, stating, implying, or suggesting that payments to growers should be or were being suppressed industry-wide.

Now, we heard some characterizations today that such -- that there's lots of evidence. There's a ton of

evidence. It's going to -- it's going to be presented, you know, at some point. Heard some of that yesterday too. But we haven't seen any of that overarching evidence. There is some discussion about a -- and, in fact, Your Honor, every time you ask about it, typically, the answer that comes back, well, there's this exchange of pricing information. That's what we mostly see. There's an exchange of pricing information, and why would you exchange pricing information if you weren't going to use it to fix prices.

What there isn't is any kind of detailed discussion of that pricing information at all, what it is. Nor was there any discussion of how it's used. And I'm going to go into that in some detail with emails and the like here. But the reality is, nor is there any discussion whatsoever of the recognition that exchanging pricing information, in and of itself, is not illegal, and, in fact, has a very significant procompetitive effect. And there are lots and lots of courts in this country that have recognized that.

THE COURT: So before we get too far down your path, Mr. Kasowitz, I want to start where you started. I don't think you defined the question correctly in the first instance, but let's explore this. I don't think what the plaintiffs are going to be required to prove at trial is that 21 integrators joined in a nationwide conspiracy to

affect 147 plants and all 24,000 growers. That's -- didn't you set the bar too high?

At trial, won't the question for the jury be here whether Pilgrim's conspired with one or more other integrators to suppress grower wages, through one or both of these mechanisms? Isn't that the question?

MR. KASOWITZ: Yeah. I didn't say that -- I didn't say that that was going to be the standard. What I said, Your Honor, respectfully, was that there's no evidence of that. And I said and what I mean is that because there is no evidence of that, they're going to go to, as they've said, these two other purported conspiracies, a conspiracy to no-poach, and a conspiracy to exchange pricing information.

So I -- that's what they're going to try and prove. And what I'm going to show, Your Honor, is that there is no evidence that that was ever done, either one of them, ever done on any kind of national basis. They do have to show that, Your Honor.

And I'm going to get into *Wal-Mart* to -- Your Honor picked it up, you know, perfectly at the end of the presentation of 23(b)(3), with the plaintiffs' counsel, to talk about what the -- what they need to do at this -- at this class certification stage. And *Wal-Mart* sets it forth pretty carefully, and I'm going to go into that too.

So you're right, Your Honor, I wasn't -- I wasn't saying that they have to prove -- I wasn't saying that they have to -- that they have to prove that in that way. That's what they're claiming. And to get to that -- to get to that claim of an overarching conspiracy, they have to prove at trial -- and if we were to go to trial -- that there is this no-poach agreement. They have to prove that there's a no-poach agreement. They have to prove that that's a conspiracy. They have to prove that that impacted on members of the class. They can't do that. And that's what I'm going to take and go through some detail to demonstrate that they can't prove any element of that. They can't prove that there was -- I'm sorry. They can't prove that there was a conspiracy. They can't prove that there was impact. And then I'm going to do it with the information sharing.

THE COURT: Well, I'm all ears. I don't know if you have in mind addressing this as part of your presentation, but maybe this is a good place to start. What do we do with the adverse inferences? Because those -- those are questions that bear on each of those points, I think.

There were executives at Pilgrim's who invoked the Fifth Amendment in response to specific questions about the existence of a conspiracy, the scope of the conspiracy, the purpose of the conspiracy. Yes?

MR. KASOWITZ: Yes, there are. There are executives at Pilgrim's who invoked the Fifth Amendment with respect to those questions. And the reason that they invoked the Fifth Amendment with respect to those questions was that they were being prosecuted by the United States government for price-fixing with respect to -- not a grower's conspiracy -- but with respect to allegations of fixing price with respect to downstream sales of broilers.

THE COURT: And they were acquitted, I think, ultimately, but --

MR. KASOWITZ: Your Honor, they were tried three times. Three. The jury was hung twice, and on the third, they were acquitted. So to the -- to the extent -- I'm sorry, Your Honor. You wanted to ask something?

THE COURT: Go ahead.

MR. KASOWITZ: To the extent that there's a consideration of inference with respect to their invoking the Fifth, which was -- which was done during the time that -- their depositions were taken, I think, before the third trial it came about. I'm pretty sure of that. But to the extent that there's a question about inferences to be drawn, it will also be presented to the jury that they were prosecuted three times, two juries hung, and one acquitted.

THE COURT: That may be. I'm not -- I'm not familiar with the case law about that question. But it

seems to me an impasse at class certification. When the defendant -- when Pilgrim's says in its papers, for example -- and you do repeatedly -- there is no evidence to support this point, no evidence to support this point, etcetera. I think I've underlined that in the brief at least four times in your papers. Couldn't the jury find, based on the invocation of Fifth Amendment and an adverse inference instruction, that Pilgrim's was part of a nationwide conspiracy for this very purpose?

And if a jury could draw that inference, based on the Court's instruction and that invocation in a civil case, isn't there evidence that would support the plaintiffs's theory at this stage?

MR. KASOWITZ: I don't think so, Your Honor. First of all, the Fifth was taken with respect to every single question at these depositions because of the posture of where these -- where these CEO -- where the CEO, who was acquitted, was in the criminal process. Number one.

Number two. That CEO doesn't have a relationship with the company anymore. But the other point here, Your Honor, is they're very, very specific points. They are certain things that we are being specific about and that the plaintiffs' haven't been.

What the -- when the plaintiffs say there's tons of evidence of an integrator-wide conspiracy that Pilgrim's

participated in to -- to suppress the price of grower pay with respect to this no-poach -- this no-poach -- this no-poach conduct. That's what they say. Okay.

I was very careful leading up to this, and I will be very careful in showing that there isn't such evidence at that level, top-down evidence at that level; okay? Or at least they haven't shown it; okay? They haven't shown it. What they have shown, what exists, what is contained within the -- you know, an appendix that Dr. Singer attaches to his report are examples of individual, no-poach agreements between the managers of plants, of various integrators, at different locations in the United States.

That does not establish the top-down, integrator-wide conspiracy that they are alleging here. And *Wal-Mart* makes very, very clear that they have to -- that they have to establish -- they have to -- they have to come forth with hard evidence at this point in order to be able to establish the glue by which the numerous decisions and conduct at hundreds of plant, affecting thousands of growers, whether or not that can proceed on a class-wide basis. That's our point.

And so -- so when we look at the evidence, we look at it carefully. What -- they're -- they're very general. The statements that have been made have been very general in saying, hey, there's all this evidence of collusion and of

conspiracy with respect to no-poach. We're going to take apart -- we're going to dissect some of that evidence to show Your Honor, that in order for them to be able to proceed on a class-wide basis, they have to carry that burden.

THE COURT: So I'm eager to hear your analysis of that. Let me ask you one more question. It may be more than one, but at least one question. It's related to the question I asked Mr. Walker. In a conspiracy case, there's rarely direct evidence. Sometimes. The evidence in a smoking room or the e-mail between the CEOs. Most often, the jury is asked to decide whether on balance, the evidence supports the inference of the existence of the agreement, whether it's been established. I'm actually not -- I think conspiracy is clear and convincing evidence, but I'm not sure. We'll deal with this when we to get to it. But whether it's a preponderance or clear and convincing, the question will be whether there -- it seems to me what you're going to ask me to do in a moment is decide -- before summary judgment -- with certain data points in the constellation, whether a jury could reasonably infer the existence of the conspiracy, which you have not -- which you say the plaintiffs haven't established independently.

But isn't that where the -- isn't that where the rubber is going to meet the road in this case, in the

rigorous analysis? Is whether there's enough that a reasonable jury could support -- could find the inference.

MR. KASOWITZ: Two things, Your Honor. Yes. In a situation where discovery is now closed, after it's been going on for three years, where there have been, literally, millions of pages of documents produced, 90 depositions taken, and all of this work done -- we've got a record here -- and there's not one email that says, hey, we've got this conspiracy here, and you as -- and you as the -- you, in the plants, you've got to carry it through; okay? So that's one piece. And that does go to the issue of your -- of the Court's gatekeeper function at this point, in making a determination as to whether or not the case can be tried as a class action case.

But the other piece, in any event, whether you accept the -- whether you accept that proposition or not, the reality of the evidence that's been presented, including Dr. Singer's report, is that this is a highly-localized industry with respect to decisions about grower pay.

And the evidence is going -- the evidence is going to be clear that the way that decisions are made is that they bubble up from the plant level, and the decisions are made at the plant level based on a variety of factors. And, sure, do they go up to -- do they go up to corporate and get signed off on? Yeah. They go up there, they get signed off

on as a matter of course, but those -- but the suggestions are always taken.

And the evidence that has been presented that's on this record, Your Honor, is that any of the no-poach agreements that have been entered into, including in Delmarva, have all been locally based.

THE COURT: So I think this is my last question before you launch into your presentation.

MR. KASOWITZ: It's okay, Your Honor.

THE COURT: I'm breathless with anticipation. But all of the evidence you're talking about is class-wide proof. So help me -- put my eyes on the target you want me to focus on before you begin. This is important at this stage because why? What -- you're going to establish a failure of the plaintiffs' class certification proof how?

All this evidence about how things worked, what plants did, what levels were approved, who meant what, whether there was a conspiracy, that's a class-wide issue. Every integrator -- every grower, rather, their case would rise or fall on the existence of the conspiracy based on the same proof. No?

MR. KASOWITZ: No. No, Your Honor. We're going to do it the same way that it was done in *Wheeler.* We're going to do it the same way that Judge Folsom did it. That's not just an analogous situation. That's the same

situation. That's the same situation.

THE COURT: I don't know. I know what our record is here. That's what I'll evaluate, is our record in this case.

MR. KASOWITZ: Well, in *Wheeler*, Judge Folsom -- in *Wheeler*, Judge Folsom was faced with the exact two claims, the same claims. A no-poach claim, which sought to be certified on a class-wide basis, but the class was much narrower, Your Honor. It was all of Arkansas and a little bit of Texas. And the way that he -- the way that the claim was framed was on the basis of -- sort of allocating markets between growers; okay? But it was no-poaching when you read the decision.

And then Agri Stats, dealt with Agri Stats as well. And he dealt with -- and he dealt with whether or not that also constituted -- you know, that could be -- a case based on exchange of that information could be tried on a common -- on a class-wide basis.

And what he concluded, Your Honor, was that the factors affecting decision-making with respect to grower pay are so -- so completely individualized and localized, that you couldn't do it. Because you couldn't -- you know, was it -- take your point, Your Honor. Inferences. Okay.

People don't go and just say they're going to -- you know, they're going to engage in some bad behavior and

then -- and then -- you know, and then go prevent a grower from poaching. They're going to -- you know, they're not going to -- they're not going to talk about it; all right?

So then what inferences can be drawn if grower pay in a particular location is suppressed. And what Folsom -- and what Judge Folsom -- who's very well respected -- what he said was, well, you've got a lot of different factors that impact on price. So can you infer from a suppression of price? If the price goes down, can you infer that that's a result of a no-poach? Can you infer if the price goes down, that that is a result of the exchange of Agri Stats information? He's saying you can only make those inferences based on individual situations with respect to each grower, to see what was happening with respect to each grower. Because with respect to each grower in each particular locale, there's so many other factors that can affect whether that price is suppressed. So --

THE COURT: Let's get into your proof, should we, before we break? We'll break in about ten minutes to let our court reporter stretch her fingers, but let's get started.

MR. KASOWITZ: I didn't do any proof yet, Your Honor?

THE COURT: I'm sorry?

MR. KASOWITZ: I didn't do any proof yet?

So, Your Honor, as I was -- as I was saying, that, you know, the most that plaintiffs can do, with one or two exceptions, are to point to emails reflecting a limited number of handshake deals, where there are deals not to solicit each other's growers. And these involve local plants, for a limited period of time, in localized geographic markets. They don't in any way reflect the overarching agreement that plaintiffs are alleging here.

And when you take a look at it -- when you take a look at their proof, which we're going to do in a second, it really confirms the opposite of what they're seeking to have this Court do, which is that the inquiry here is really on an individualized basis.

Now, I think the threshold issue before turning to that is -- Your Honor -- Your Honor presented the question to plaintiffs, you know, just a little bit ago, which is, you know, what's the -- what's the burden? What's the standard? What has to be demonstrated by the plaintiffs on a class certification hearing in order to meet their burden?

And *Wal-Mart* is very clear. *Wal-Mart* held in 2011 that the plaintiffs bear the burden of "affirmatively demonstrating" through "convincing proof" that the putative class "in fact" meets the requirements of 23(b)(3) and the other -- and the other elements. And convincing proof. And that means they have to show, in fact, that those

requirements are met.

Now, the plaintiffs say that *Wal-Mart* is inapplicable for a couple of reasons. First, they say it's 23(b)(2) case for class-wide injunctive relief, and it involves a discrimination claim -- a discrimination claim -- I'm sorry, Your Honor -- not an antitrust claim.

But that -- that effort fails. First of all, the burden that the plaintiffs have to meet under 23(b)(3) is more exacting than the standard under 23(b)(2). And there's nothing in *Wal-Mart* that indicates that the nature of the claim changes the standard for class certification in an antitrust case compared with a discrimination case, as they argue.

Wal-Mart sets forth a general standard and the standard applies directly to this case. In *Wal-Mart,* the Supreme Court held that the legality of thousands of individual hiring decisions, at thousands of *Wal-Mart* stores, could not be determined on a class-wide basis without convincing proof of a corporate "pattern or practice of discrimination."

This is what the Supreme Court said: "Without some glue holding together the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question why was I

disfavored."

It's the exact same issue here, Your Honor. Without some glue holding together all those grower-pay decisions, it will be impossible to say that examination of the 24,000 putative class members' claims for relief will produce a common answer to the crucial question of whether and why any particular grower had its pay suppressed.

And, indeed, Your Honor, this case is even less appropriate for class certification because it involves not just whether a single company had an alleged corporate pattern and practice, but whether 21 different companies had an alleged corporate pattern or practice of acting as a single cartel. And in conducting the rigorous analysis that *Wal-Mart* requires, there's no question that the Court needs to delve into the merits of the case.

The plaintiffs argue that the Court is not supposed to consider whether there's evidence of an overarching agreement. They say that's for the jury. I just heard it a little bit ago.

But under Rule 23 and *Wal-Mart,* that's not the case. If there's insufficient evidence -- and, here, there is no evidence of this overarching agreement -- then the class can't be certified. And in conducting this rigorous analysis, it's up to this Court to determine whether there is a threshold amount of evidence permitting certification.

Wal-Mart went a little further and it said class determination -- "Class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action. If the courts rigorous analysis "overlaps with the merits of the plaintiff's underlying claim," the Supreme Court in *Wal-Mart* said that can't be helped.

Now, the plaintiffs have been arguing that whether there's an overarching agreement to suppress grower payments can only be decided by the jury, because a jury can find on a class-wide basis that there was or was not any conspiracy, which is what they call, I think, a fatal similarity. But that argument turns Rule 23 on its head, Your Honor.

Basically, that argument would basically take away the Court's function as a gatekeeper, and it basically eliminates Rule 23. It says any time that you have well-pleaded allegations of class conduct -- or class violative conduct, you just go to a jury trial and figure out -- let the jury decide. And if the plaintiffs win, they win, and if they lose, they lose. No need for Rule 23 whatsoever.

So, now, I'm going to go into --

THE COURT: That's not entirely right, is it? I mean, think if there's adequate evidence from which a jury could reasonably find the existence of a conspiracy, the

conspiracy -- the existence of a conspiracy will, by definition, focus on the intent and conduct of the alleged co-conspirators, does it not?

I mean, that's just -- I don't know how to avoid that fact. The existence -- that will be common proof. The conspiracy either exists or it doesn't exist. And whatever the scope, whoever alleged to be the victims of the conspiracy, how they're impacted may be individualized questions. But in any conspiracy case, the threshold question will be was there an agreement. Is it not the threshold question just as a matter of fact in a conspiracy?

Now, that may not be -- that may not control. That may not predominate. But I don't understand how you're saying that fact in a conspiracy turns Rule 23 on its head.

MR. KASOWITZ: I'm not saying that fact turns it -- Your Honor, my apology. I wasn't clear.

THE COURT: Well, I'm sure I misunderstood.

MR. KASOWITZ: No, no, no, no, no. I'm sure I said it. I said it wrong. I made a mistake.

I'm not saying that that fact turns Rule 23 on its head. I'm saying what the plaintiffs are proposing here, which is because of that fact, that they don't really need to go through the Rule 23 exercise. They've pled -- you know, they've pled enough in their complaint. They survived the motion to dismiss. So now consideration by the jury as

to whether or not there's a conspiracy on a class basis can be done by the jury, and they either win or lose, up or down. That's what I'm saying. I'm sorry.

THE COURT: Now, I understand. Thank you. It's 10:30, and I think we're right on the cusp of your presentation of evidence, not proof. Let's take a -- we're on a schedule today. Let's try to keep this to ten minutes and come back, and we'll pick up right here, Mr. Kasowitz.

MR. KASOWITZ: Thank you.

(Recess taken.)

THE COURT: At this rate, we're never going to get to your discussion of evidence, but I do have another threshold question for you before we get into it.

In terms of framing, we're not at Rule 56 stage yet, but if I conclude that there's sufficient evidence of the overarching conspiracy to survive summary judgment, hypothetically, what's the impact of that decision for class certification in your arguments here?

MR. KASOWITZ: It doesn't -- it doesn't mean that certification should be granted, Your Honor. It's just that it's a -- it's a ruling on the merits. Because the reality is that even if there are claims that are going to proceed, the issue is that they shouldn't be permitted to proceed on this record on a class-wide basis.

So the significance of this discussion -- I mean,

the significance of getting into the facts in this discussion is that whether or not the -- you know, whether or not there was a no-poach agreement reached, you know, in a couple of -- between two integrators in a particular location, all of the -- all of the evidence that is going to relate to that will be highly individualized so that, sure, you can have a case, and those no-poach plaintiffs -- or the no-poach plaintiff can bring an action, but it's not going to be either, A, in a representative capacity, or, B, as a member -- as a putative member of the class. That's the -- that's the point.

And I think that going through this -- going through this exercise -- at least we're going to do it for a few of these entries that Dr. Singer made -- will demonstrate that. That whether or not there, you know, a violative agreement to no-poach, you're only going to be able to assess it and ascertain whether it was and whether there was an impact on an individual basis.

THE COURT: I'm a little leery about the exercise you're about to start into because I want to make sure we make good use of our time. But I think I understand it. And there's a reason you've framed it this way, rather than characterizing the evidence and explaining to me why each of the pieces of evidence cited by the plaintiffs -- mostly referring to Dr. Singer's materials -- is insufficient to

show the existence of the overarching conspiracy, but if you want to illustrate with some points, then we can do that.

MR. KASOWITZ: Yeah. And that's the point. I mean, we've listened to very broad, general statements that are -- have been presented to the Court as sort of assumptions of fact. Well, Your Honor, we have all this evidence. We have all this evidence of this overarching conspiracy. There were all these emails, there's all these communications. I really think it's important to kind of -- to drill down on it.

So Dr. Singer summarizes this evidence at Appendix Table 27, page 218. But -- and this -- this is important, Your Honor. Before we look at the specific examples, it's important to -- Dr. Saravia has done some work in analyzing this. And even if we assume -- even if we assume that everything in Dr. Singer's chart reflects a no-poach agreement, we just concede that with what the -- we concede what the plaintiffs are saying about it. If you add all of the references that Dr. Singer has in his chart -- and he's got like nine different incidents -- you -- they only reflect no-poach agreements covering half of the plants.

So they only reflect no-poach agreements covering 75 out of 147 of the plants that are at issue in a national case. And this is -- this is Saravia report at paragraphs 62 through 66, Your Honor. And just -- and what Dr. Saravia

did was to assume counterfactually that all of Dr. Singer's entries reflected a no-poach agreement -- that's at paragraph 64 -- and where the companies, but not the plants, were specified in the chart. In other words, it was just a reference to one of the integrators, not to any specific plant. Dr. Saravia assumed, for purposes of her analysis, even without any evidence, that each one of those company's plants was covered by a no-poach agreement. So if there was a reference to a company, then all of their plants -- Dr. Saravia assumed for purposes of this analysis -- was covered by a no-poach.

So if you give Dr. Singer and the plaintiffs here not only the benefit of every doubt, but further and then some, the conclusion is that, at most, half of the plants in the country were covered by an alleged no-poach agreement and half were not.

And then, as you can tell, what's going to come next, 50 percent is nowhere near sufficient, Your Honor, to justify certifying a class. No court has ever certified a national class where 50 percent of the putative class members were uninjured.

And Mr. Torres, I think, cited some cases yesterday -- I'm not going to go into all of them now -- where if as low as 10 percent of a class were uninjured, that would mandate denial of class certification. There was

back and forth about it, Your Honor. There was discussion about 15 percent. There was discussion about some dictum in *Black*. But 50 percent, no question that that would mandate denial of class certification.

Now, let's turn to Dr. Singer's appendix table, and let's turn to the first example he has. The first example he has, the first entry, which is on page 218, relates to a no-poach agreement between Kevin Crider, who, in 2015, was a live production manager at Pilgrim's Mayfield, Kentucky, plant, and his counterpart at a Tyson's in Obion County, Tennessee. And these plants were within 45 miles of each other.

Now, on its face, this particular agreement doesn't amount to an agreement between two companies, let alone the 21 companies. It relates only to the discussions between these managers at these plants. And in this first entry, Singer summarizes testimony about an August 27th, 2015, email between Mr. Crider and his boss, Matthew Herman, in which Mr. Herman says, "Make sure we have thoroughly reviewed any Tyson -- former Tyson grower -- former Tyson grower before any commitments are made."

To which Mr. Crider replies, "We typically have not tried to cross lines. Shane and I have a good relationship and we try to stay out of each other's area."

Now, Your Honor, Shane is the -- is the -- is

Mr. Crider's counterpart at the Tyson plant in Tennessee. And contrary to what plaintiffs would have this Court believe -- because they're featuring this in Dr. Singer's report -- Mr. Crider's response doesn't evidence any agreement or anything illegal. Crider is telling his boss that he and a Tyson plant manager try to refrain from hiring from each other's growers, plainly because they don't want to trigger retaliatory hiring from each other. That's legitimate. It's conscious parallelism. And it's not illegal under -- under antitrust laws.

Now, the Supreme Court in *Bell Atlantic v. Twombly* has made clear that independent parallelism doesn't establish the kind of contract or conspiracy that's required. And that proof of a Section 1 conspiracy has to include "evidence tending to exclude the possibility of independent action."

Now, in any event, Your Honor, even if Crider's exchange here with Shane was evidence of an agreement -- which we submit it's not. On its face, it's not -- it evidences only local dealings between two employees of competing chicken companies, production plants, in the northwest corner of Tennessee, where it borders with Kentucky. Whether those dealings amounted to a non-solicitation agreement that was suppressing grower pay in a 50-square-mile area is an inherently individualized

inquiry, which could only be determined with respect to the local proof.

So our position is, Your Honor -- I don't want to belabor it -- but whether or not you credit -- whatever -- plaintiffs will say, well, this is an egregious -- you know, this is egregious conduct, we can draw inferences from it, everything else. We say, on it's fact, it's -- hey, he and I -- I don't go after -- I don't go after his -- I don't go after his growers because if I do, then he's going to retaliate.

Just like, Your Honor, you know, there are some big law firms that we compete with, that do litigation like we do. And I don't go after -- you know, I don't go after some of the lawyers at those places. I don't want them coming after me.

Completely, there's absolutely nothing inappropriate or illegal about that. It's not rooted in an agreement.

So -- but whether or not, whatever the merits are, you're going to have to look at the proof at that plant; you're going to have to look at the dealings between these people; you're going to have to look at what the past conduct has been in that place; and then you're going to have to look at impact evidence, you know, with respect to the grower, and whether or not there was an impact and the

like.

And so, in any event, whatever is happening in the northwest corner of Kentucky and Tennessee is not going to be relevant to what's happening in Delmarva.

THE COURT: Unless it is. I mean, how do you make the proof -- how do you make a proof of a nationwide conspiracy between integrators without examining evidence of discreet agreements -- trying to establish for a jury enough discreet agreements, in enough parts of the country, among enough integrators for a jury to assess whether or not the plaintiff has established the existence of a broader conspiracy?

MR. KASOWITZ: Yeah. But then you have to link it up, Your Honor. Under *Wal-Mart* -- under *Wal-Mart*, you've got to find -- you've got to find the glue. And my only point, Your Honor, look, a trial is a trial; okay? But here we know what the record is because discovery is done and they've -- and the function right now is can this -- can proceed as a class. Sure. You're right, Your Honor. In order to look at an -- to determine whether or not there's an overarching conspiracy that's illegal, you're going to look at what's happening on the ground. But then what you're going to have to find is a link between them, the glue.

And we submit, Your Honor, that on the record --

that the record in front of this Court -- and it's a big record -- and there's a lot -- you know, there's a tremendous amount of work that's been done. Lots and lots of trees have been felled. With respect to this record, there's not enough to get to that glue on this record. On this record, it's an individualized inquiry.

Now, Your Honor, let me turn to another example. And I'm going to do this quick. It's not going to take -- I'm not going through all of them. But I think that these are instructive.

The next on Dr. Singer's table, the second paragraph in the first entry. This is really the plaintiffs' star witness, so to speak. This is Delmarva. And so -- you know, look, the plaintiffs' argument is that as Delmarva goes, so goes the entire country. They say that, you know, there's a no-poach agreement in Delmarva, and because Singer claims that on certain variables that he selected, Delmarva is similar to the rest of the country, then the rest of the country is also impacted by the no-poach agreement.

Respectfully, we disagree. But the point here is that Singer -- and I just want to emphasize -- I'm not going to go through what was done yesterday, but I do want to focus on one particular thing.

Singer ignores the really critical variable, which

is the actual, total payments to growers in the rest of the country were -- what those payments actually were during the relevant time period. Those payments to growers in the rest of the country were not suppressed, Your Honor. They increased. And that was shown by Dr. McCrary, and that's not disputed by -- that's not disputed by plaintiffs.

Nor is it disputed by plaintiffs that the fact that Delmarva was the most concentrated chicken growing area in the country, by far, prevents that -- prevents the extrapolation that the plaintiffs are trying to do.

So I want to bring this home here, Your Honor. Two of the named plaintiffs in our case, Karen and Marc McEntire, were growers for the Pilgrim's Nacogdoches plant in East Texas in 2013, and there were no other chicken companies in the area.

And what the plaintiffs are saying is that Mr. and Mrs. McEntire are in the same class and entitled to recover the same 4 percent as the growers in Delmarva, based on the same Delmarva evidence, even though there were no other chicken companies in Nacogdoches and no other chicken company trying to poach the McEntires.

And not only that, the plaintiffs invoked Delmarva as the reason to certify a national class in which the McEntires would not only be included, but would serve as class representatives. Of course, as Your Honor knows,

Pilgrim's was not in Delmarva.

So we've got two extreme circumstances, Your Honor, we've got the McEntires located in a place with no competition. We got Delmarva in a place where there's intense competition. In between, there are areas all over the country, with varying degrees of competition.

As Judge Folsom pointed out in *Wheeler* -- which I'm going to get to in a minute -- certifying a national class here would lead to thousands of minitrials of liability and a fact of damage, which totally defeats the purpose of Rule 23.

Let me go on to the next example. At page 219 of the report, Singer quotes testimony from Pilgrim's, Adam Willis, who's a live operations opmanager at a plant in Northeast Georgia. And Singer -- Singer doesn't just quote from Willis, he puts it in bold to make sure that we know how important he thinks this is, Your Honor. The quote, according to Dr. Singer, reads:

"QUESTION: Where is that an unwritten rule? At Pilgrim's Pride?

"ANSWER: The chicken business, in general, everybody."

And that's a reference to Mr. Willis's deposition transcript at page 217.

Now, Dr. Singer would clearly have this Court

believe that the unwritten rule that Mr. Willis is testifying to, "in the chicken business, in general, everybody," referred to and was evidence of the plaintiffs' industry-wide, nationwide, purported no-poach agreement.

But, Your Honor -- and I'm a little surprised about this -- I find it surprising that Mr. Willis was not referring to any no-poach agreement. The words that Dr. Singer omitted from Mr. Willis's testimony make that clear.

Mr. Willis had earlier testified, at page 244 of his transcript, "It's an unwritten word. It's also an unwritten word that you never go on anybody's farm while they're have -- while they have chickens to try and recruit that grower."

That part was in Dr. Singer's report, but he leaves out the continuation of that testimony, which explains what Mr. Willis was really talking about. Quote --

If we have -- do we have that, Michael? Good.

Okay. "The reason we do that is because the biosecurity to prevent the spread of diseases from their -- may be a farm they've been on to our farm. We even have signs that say, stop, do not enter biosecurity area. He had service reps going on our farms recruiting growers. Yeah. It was all servicemen that I remember recruiting growers while we had birds. Now, had we not had birds, he's welcome

to go on that farm because he can't spread no disease to me when I ain't got birds there, but not when there's birds there. He should never go on that farm. They shouldn't, but they did."

That's the Willis transcript at page 208.

Now, let's go back to the sentence that Dr. Singer put in bold when Mr. Willis was asked about the unwritten rule and answered in bold "The chicken business, in general, everybody." But Dr. Singer left out the rest of Mr. Willis's sentence.

The rest of Mr. Willis's read: "Because of the threat of AI."

MR. ROSS: Which is --

MR. KASOWITZ: Excuse me. Sorry. Your Honor, AI is avian influenza, as one of my partners was trying to inform me because he thought I forgot.

The unwritten rule that Mr. Willis was testifying about, the one that he said governed "the chicken business, in general, everybody," was not no-poach agreements, as Dr. Singer would have this Court believe, but keeping people off growers' farms when there are birds in the house in order to prevent the spread of avian influenza.

Now, the plaintiffs in their reply brief go even further in distorting Mr. Willis's testimony. While Singer, in his report, put a bracket around the period, denoting the

omission -- which I think is bad enough -- the plaintiffs in their brief ended the sentence as if that were the entire quote, which they say constitutes class-wide proof of a no-poach agreement. They say that at -- their reply brief at page 6.

Plaintiffs gave no indication whatsoever that they were omitting Mr. Willis's words, demonstrating that his testimony had to do with avian influenza. It had nothing to do with the no-poach agreement.

Certainly, it's not evidence of impact or of class-wide proof of a no-poach agreement, which we think that the plaintiffs have been disingenuous about with respect to that.

Now, look, what -- the plaintiffs rely on no-poach agreements and the -- and the Agri Stats, but what they really are trying to do for class certification purposes is to make reference to a lot of broad statements that they think supports the argument that Singer is trying to make. And our purpose in looking in a granular way at some of this is to demonstrate that it's not as it has been represented, Your Honor, and, in any event, needs to be determined on an individual basis.

One more example. Let's look -- let's look at Sanderson, which is one of the companies that settled. In the second entry in the Sanderson section of the appendix,

the plaintiffs quote from portions of the deposition testimony of Joe Sanderson, Jr., who's the Sanderson CEO. And Sanderson was asked about a hypothetical phone call from a Sanderson competitor to one of his employees, giving the employee a heads-up that one of Sanderson's growers is now growing for that hypothetical competitor but was not recruited.

Mr. Sanderson was asked in the deposition, "Well, what do you think about that? Is that okay with you? What do you think?"

And Sanderson testifies, "My guy didn't talk to the guy. He said thanks for calling. The other guy made the call. No big deal. We didn't have a conversation. No big deal. Neighborly. Didn't want to start a fight. Didn't want ill feelings. Neighborly. Yes, neighborly. Didn't want to start a fight. It's a Mississippi thing to do."

And that's at page 123 of Mr. Sanderson's transcript.

So the fact that plaintiffs have included this entry within this appendix, which is supposed to the best of the best examples of a supposed illegal no-poach scheme of nationwide proportions, I think says it all about how this needs to be viewed from a class certification basis. And I think that their last sentence there says it all as well.

"It's a Mississippi thing." This is a local matter.

Now, as I said, I'm not going to go through all of these. Those are the ones I'm going to go through. But what we've done has been to sort of tabulate, you know, what -- what buckets that all of these -- all of these incidents fall into.

And there are 35 entries in this appendix. 17 are plainly -- plainly-involved, localized situations on their face, including eight in Delmarva. They no way evidence a nationwide -- on their face, Your Honor, a nationwide or industry-wide agreement. 16 evidence, at most, unilateral action or conscious parallelism. And some of those 16, including the Sanderson one, don't seem to evidence much at all. Two don't involve putative class members at all, two of these examples. One is Case Farms, which involves a non-grower employee, and the other is Wayne, which involves a breeder grower, not a broiler grower.

Now, I'm going to turn to the information sharing agreement. As I said before, there's no evidence that the local plant managers who were principally responsible for grower-payment decisions, no evidence that they were instructed by their companies to use Agri Stats or any other data to suppress grower pay or that of the plant managers and the like.

Now, I believe, Your Honor -- and I made this

point before -- that had there been a national, industry-wide agreement over an 11-year period between and among 21 companies, for the purpose of basically suppressing grower pay, then there would be something. There would be communications, emails, instructions, directions to the plants, something that would -- that would be instructing about, you know, what to do. I mean, I've done a bunch of big antitrust cases over the years, and I've never seen a case that didn't involve that, even when there wasn't an industry-wide conspiracy and the like.

But what's -- I think, again, getting to the specifics of what's important for our purposes, for class certification, no matter what, no matter what the interpretations are that are given to those emails, which here don't exist, 21 companies in the plants used Agri Stats in a bunch of different ways. Some of the companies used the information to decide to increase grower payments.

And if you look at Koch, and the March 30th, 2022, deposition of Dennis Gordon of Koch -- he worked at the Montgomery plant -- he says that he thought that in their plant, that Koch was too low on pay, so he was -- you know, he looked at the information, he said, for the purpose of trying to get to a recommendation to go up and the like. And by contrast, several other integrators testified that Agri Stats didn't impact on their decision-making on grower

pay at all.

The CEO of Simmons testified that Simmons had never used Agri Stats in connection with a decision to lower or to decline to raise grower pay. And that's David Jackson, his deposition, at pages 237 through 238.

And Lon Beasley, who's the grow-out manager at the House of Raeford, testified that Agri Stats was not useful in setting grower pay because of all of the different factors impacting price in the local markets. What he said was, "We're all doing different things, and we are all in different areas, and we all have different costs. So, really, I can't sit here and look at Agri Stats and tell anything about it. I mean, it costs. Costs are different in every area."

Now, Beasley's testimony reflects the fact that decisions concerning pay were made at the local -- at the local plant level, and they depended -- and they were dependent on a bunch of different factors, cost of lumber, fuel, feed, and other overhead, as well as competition from other plants and integrators.

And so Randy Stroud, Pilgram's head of live operations, he testified that grower pay, "really doesn't relate very well to the Agri Stats average because the average is for all. It is the average of the averages of all complexes and areas, and so it really has more to do

with how we compete in that local market, not Agri Stats' average." And that's -- his deposition is at pages 30 through 33.

He also testified in his 30(b)(6), that "Grower pay varies terribly from one geographic location to another, and that the Agri Stats numbers, because they're average numbers, they're not very helpful really to determine what your competition in the area is paying." And that's his 30(b)(6) at page 170.

Now, just to underscore the point that this is local decision-making, Mr. Stroud testified that in talking about a decision to change price paid to growers, "Usually, it bubbles up from the complex. The broiler manager, live production manager, will feel there's a need to address or to basically -- they propose a pay increase when competition or need for the houses, or it will come up through the complex. The complex manager, they get him onboard." And then Stroud testified that that would get approval at corporate headquarters.

Your Honor, I want to -- I want to -- setting forth, you know, some of these facts and showing how the kinds of factors that determine how pay is impacted, and that it's locally, I want to turn to *Wheeler,* because *Wheeler* was dealing with precisely this situation. And I'll just -- I'll go through it pretty quickly, but I'll deal

with the reasons that the plaintiffs have argued in their papers that *Wheeler* doesn't apply here, which I think are not meritorious.

So *Wheeler* was not a national class, as we said. It was limited to Arkansas and Northeast Texas. It wasn't among 21 companies, it was only two. It didn't involve 147 plants, only nine. But even in that much narrower context, the court found that individual issues predominated, and the court rejected the theory that the plaintiffs, you know, present here, Your Honor, that the class could nonetheless be certified because there was a supposed overall suppression of grower payments.

Your Honor pointed out the first day in a question that, well, even if things are different at different plants, you know, plaintiffs' theory is that there's an overall suppression of pay. So how does that impact on class certification? And it does impact on -- it doesn't override the individual issues, Your Honor, as Folsom -- as Judge Folsom held: "Although, plaintiffs argue that this factor is overcome by simply looking at the overall percentage that defendants' antitrust violations suppress all base prices, the court is unpersuaded because plaintiffs cannot prove with class-wide evidence that an increase in base price would make growers better off."

And, you know, what the court was holding was that

because these payment decisions are so localized, there's simply no way to show -- had the theoretical suppression been present -- that the growers would have received any more money. It's at least as likely, that given local factors, that impact pay, that the local decision-makers would have paid them the same amount or more.

Judge Folsom also identified other individual issues precluding class certification in circumstances that are identical to those present here, Your Honor. For example, he found that merely determining whether growers compete with each other would require an individualized analysis based on factors specific to that complex.

And the court rejected plaintiffs' argument that due to defendants' collusion, putative class members were harmed by their inability to switch complexes. The judge rejected the argument because some growers were unable to switch, due to geographic limitations, while others were able to do so.

As Judge Folsom put it: "The resulting conclusion is that plaintiffs are unable to demonstrate this fact of damages without delving into the individualized traits of each complex or grower locale."

Because the plaintiffs couldn't -- couldn't demonstrate fact of damage on a class-wide basis, Folsom said -- held: "Individual" -- oh, he also held that

individual computation of damages was -- would have to be the case. "Individual computation of damages is also inevitable because different compensation schemes are utilized for conventional houses, tunnel-ventilated houses, and premium houses."

And, in short, Folsom -- Judge Folsom correctly found: "Such a scenario" -- which is exactly what we have, here Your Honor -- "would require a multitude of minitrials and precludes class certification."

Now, because -- because *Wheeler* is on point, the plaintiffs come forward with a number of reasons that it shouldn't apply here. As a starter, they criticize the plaintiffs' counsel in *Wheeler* for developing "virtually no evidentiary record" and offering "no economic analysis compared to the robust evidentiary showing here." That's at page 15 of their reply brief.

And Your Honor saw that in their brief and picked up on that and asked yesterday whether *Wheeler* is distinguishable because of a lack of -- lack of an evidentiary record. Well, I want to answer your question, Your Honor. The answer is no.

It's evident from Folsom's decision that there was a very extensive factual record before him. The court described the nature of the industry, displayed a keen awareness of how growers' pricing and payment worked. The

decision extensively referred to and provided document references for numerous, individual fact issues that are also present here, such as growers switching integrator plants, competitive radius of those plants, disparate grower pay based on different housing classes, and a number of other differences.

Now, Your Honor, not only was there a lack of -- was there no lack of an evidentiary record in *Wheeler,* there was actually a very robust evidentiary record there.

Michael.

At the class certification hearing, the court admitted into evidence over a hundred exhibits and rebuttal exhibits, including deposition transcripts, grower contracts, party declarations, grower pay settlement sheets, cost comparison analyses, grower ranking reports, grower waiting lists, email inquiries by individuals interested in becoming independent growers, and so forth.

So it's not accurate to say that there was an inadequate record in *Wheeler* as a reason for not applying a case which is fully on -- you know, fully and squarely on all fours with the case here.

A couple of other things. The plaintiff said there was no -- one of the other distinctions was, they said there was no nationwide discovery in *Wheeler*. *Wheeler* wasn't a nationwide class. And they also tried to

distinguish *Wheeler* because they said there was no analysis of a grower's nationwide mobility. Again, not a national class.

Excuse me, Your Honor.

One of the issues that took up some time yesterday was the question of market, and whether market is -- whether the appropriate market needs to be -- is a requirement for the plaintiffs to prove at this stage, at class certification.

And the plaintiffs, at page 15, of their reply brief, they criticize *Wheeler* and say it's distinguishable because they say there was "no economic analyses of the geographic scope of the market."

Well, I think they can't have it both ways, Your Honor. They can't say, on the one hand -- they can't claim that proving a national market is an obligation that they don't have at class certification. And then, on the other hand, seek to distinguish *Wheeler* because the plaintiffs there didn't do exactly what the plaintiffs here say they don't need to do. One or the other. But in *Wheeler,* you know, they claimed that that -- that wasn't done.

They also -- they also criticize *Wheeler,* claiming that there wasn't the development of the -- you know, of a proper evidentiary record. But, again, that's -- they're

trying to have it both ways. They say here, that they don't need to develop an evidentiary record, that that's for trial for determinations in front of the jury. But, on the other hand, they claim that -- they sort of criticize *Wheeler* and claim that it's distinguishable because there wasn't an evidentiary record.

So, look, I -- Your Honor, we think that *Wheeler* is an important case. It's obviously not the only support that mandates denial of class certification at this stage. We think that the holding in *Wal-Mart* by the Supreme Court is clearly -- it clearly mandates class certification as well, as well as a number of other cases.

But in these circumstances, we believe the class certification should be denied.

A couple of just very, very quick things, Your Honor. I think that Your Honor asked whether the jury -- earlier, whether the jury can say, did Pilgrim's enter into a conspiracy, when there was discussion about what a jury form would look like. Did Pilgrim's enter into a conspiracy with one or more integrators? And I think that the issue is not going to be one or more integrators or two integrators. The allegations of the complaint and all of the studies that Singer -- that Singer performed were based on a full industry of 21 integrators. So I don't know what the consequence was of Your Honor's question, but I think

that, you know, for purposes of class certification, that's the -- you know, that's the -- the set of parties that we're -- that we're involved with.

THE COURT: Thank you, Mr. Kasowitz.

Mr. Walker, any response before we take up the remaining issues?

MR. WALKER: I will try to keep it very, very brief. And I'll just start, I think, where they started, which is the evidence of the conspiracy.

And if you could put up the jury instruction real quick on conspiracy.

The evidence of a conspiracy doesn't require a smoky room with all 21 integrators meeting there and a memorandum memorializing their agreement to suppress grower pay.

An agreement, as Your Honor said at the beginning, is a commitment to a common scheme. The evidence need not show that its members entered into any formal or written agreement. It may be entirely unspoken. I think there's case law about a wink and a nod. You can become a member without full knowledge of all the details of the conspiracy, the identity of its members, the part such members played. You don't necessarily have to have met each other, directly stated what the object or purpose, stated the details or means. The evidence must show that the alleged members of

the conspiracy came to an agreement or understanding among themselves to accomplish a common purpose.

We think we have lots of evidence, direct and circumstantial, of showing, both through the no-poach and through the information sharing, to suppress grower pay. And we think we've met our prima facie showing right now with evidence that's common to the class as a whole.

THE COURT: Before you move from that point to Mr. Kasowitz's point. Dr. Singer's analysis of impact and class-wide damages assumes nationwide impact. Some of the integrators don't operate nationally. But, for example, if the evidence at trial supported a conclusion that Pilgrim's conspired with one or more co-conspirators, but not 21 co-conspirators, wouldn't we be left with at least the prospect, if not the likelihood, that some portion of the country might be unaffected. If there were portions of the country that were only -- only had certain integrators in them. And then we're left without -- then we're left with a mismatch between Dr. Singer's analysis and the jury's finding, are we?

MR. WALKER: I don't think so. Is your question if some number of the co-conspirators or alleged co-conspirators were found not to have participated in the conspiracy, how do we back out those damages?

THE COURT: So I assume, but don't know this, that

not every integrator operates throughout the country. And so if we start removing integrators from the conspiracy because of a lack of proof, and we're left with nine integrators, then we could geographically superimpose the part of the country that those nine integrators operate in, and we could also isolate some portion of the country where they don't. And we could find that there were some growers in the -- in some part of the country, geographically, where none of the co-conspirators were said to have engaged in a conspiracy to suppress grower wages. And then doesn't Dr. Singer's model include -- I'm going to make this up -- Oregon and Washington, where a jury might say we didn't find that there was an integrator operating who was part of the conspiracy.

MR. WALKER: If that is what comes to pass at trial, or I suppose at summary judgment, you back out those damages. Those class members can be identified and you back out those damages. And Dr. Singer includes in his report just a mechanical method for doing that, which is --

THE COURT: By integrator locale. So he can identify -- has identified -- and could easily identify and quantify at trial, damages, removing six integrators from the conspiracy --

MR. WALKER: Yes.

THE COURT: -- if there were regions of the

country then left without a grower -- excuse me -- that included growers in those regions.

MR. WALKER: He can identify the regions where the integrators operate, obviously, and he can also identify the regions where the growers are.

THE COURT: All right. Do the plaintiffs intend to offer proof at summary judgment or at trial that 21 integrators are part of the conspiracy as alleged in the amended complaint?

MR. WALKER: Yes, Your Honor.

THE COURT: Okay.

MR. WALKER: And, you know, to Mr. Kasowitz's point about the tables in Dr. Singer's report, those cover every one of the integrators. And I -- it's true that we don't have a direct admission from every one of these integrators, but we have a host of evidence that it's consistent with the conspiracy, if not a direct admission, and then there's other circumstantial evidence in the case, like the switching analysis, like the -- you know, the industry being conducive to cartelization. I mean, I'm not going to go through all of that again, because I actually think in the end, what *Black* says is any of this rebuttal evidence is just class-wide evidence. Whether the conspiracy exists is a class-wide issue. Whether -- and each plaintiff, if they went individually or as a class,

would provide the same evidence. And if the jury finds that they don't believe that Pilgrim's Pride conspired with any of these other integrators to be in a conspiracy, we lose as a class. That's -- that's what the evidence means. But that's the same as if we had one plaintiff making the case against Pilgrim's Pride and the co-conspirators.

Just a few clean-up points. Your -- the discussion about pleading the Fifth at the depositions, I just wanted to clarify. They were acquitted before -- the Penn and Lovette depositions came after their acquittal. And, of course, you know, we would dispute whether -- yeah. So, Your Honor, that's the date of their acquittal, and the depositions are in the record. They were, I believe, on the 24th and -- 27th and 29th. But that's neither here nor there. I would say that the -- you know, the statement that the acquittals might come into evidence, we obviously would dispute that. But also Pilgrim's, as a company, pleaded guilty in that case, and, obviously, we would want to make sure that came in if their individual executives' acquittals came in too.

I want to briefly touch on the *Wal-Mart* case. Mr. Kasowitz said that *Wal-Mart* demands that there be a corporate-level pattern and practice here that we can prove. Pattern and practice is a Title VII legal standard. That's what *Wal-Mart* is talking about. In addition, it's a

discrimination case which involves each plaintiff. You have to know what the -- what the reasons were for their demotion or, I guess, lack of promotion. The court just said it's highly individualized. That is a case where you really have to look at the interaction between every plaintiff and every store manager to understand the theory of harm. That's not our theory of harm here, that's not the case, in addition to that case not being a 23(b)(3) case.

I want to make a couple of points. Mr. Kasowitz -- about the different competition in different areas. Mr. Kasowitz mentions the McEntires. How could they possibly be harmed by the no-poach. Interestingly, the McEntires actually sold their farm to a couple from California, which really goes to our point that even if growers need to be located near a complex so their birds don't die en route to the slaughtering facility, the conspirators compete with each other nationwide, and they compete for growers nationwide, and people will look to what pay is and move to an area. And that is sort of the thrust behind this idea that there's really a nationwide market here, even if the growers have to be physically located close to their plants.

Mr. Kasowitz says pay wasn't suppressed. You look at these charts that Dr. McCrary has that show pay going up over time. The relevant fact, of course, is to the but-for

world, not to yesterday; right? Pay can go up over time. Just like he says they were looking at Agri Stats when they raised pay. The question is what would pay be but for the conspiracy; right? Not what -- was the pay higher or lower than yesterday.

I would say for the *Wheeler* case, the expert's report there was about 30 pages, but there's --

Sam, I don't know, maybe we could just put it up briefly.

There's one portion of the report where he says -- he didn't do the work; right? Dr. Singer did the work. And part of this is not an insult to the expert here. This was just how expert reports were back then. But he just says here, I'm going to get some data, and it's going to show what I need to show. And the court said, I don't think what you're talking about, this data here, Census Bureau data and settlement sheets, can show what you're going to show.

Well, Dr. Singer has done the work. And that's one of the reasons in this case we wanted a schedule where all this class and merits discovery is done -- and the expert reports are class and merits report, because we want to be able to show that, yes, not only do we have evidence capable of proving class-wide impact, we have evidence it does prove class-wide impact.

And, you know, I don't want to get into really

rebutting all of the evidence that Mr. Kasowitz went through. I would say as a high level, first of all, this avian influenza biosecurity thing is irrelevant. And, no, you can't have a procompetitive justification for a per se illegal no-poach. The companies could come up with any purported reason they want to agree not to go after each other's employees, but that doesn't come into the evidence.

Aside from that, the document -- the documents that are direct evidence of a no-poach here, I don't know if any of them -- maybe one sort of mentions biosecurity, but all of the biosecurity, quote/unquote, evidence here comes usually rebuttal testimony from witnesses. None of the direct evidence mentions biosecurity. The document that Mr. Willis was testifying about didn't mention biosecurity, and he acknowledged in his deposition that, yes, what this sounds like here in this document is just me talking about not going -- or asking for them not to go on our growers' farms.

But the larger point is all of this is class-wide evidence. All of this is going to be something that the jury considers when they decide whether we've proved the existence of a conspiracy or not. We think we'll do it, they think we won't, but, regardless, at class certification, all that means is that it's a common issue for the class.

And I think that's everything for me, Your Honor.

THE COURT: Thank you, Mr. Walker.

So I can sort of plan a little bit. What is it Mr. Madden plans to cover, if we get into it?

MR. MADDEN: It's the class waiver and release point that they made, that they claim defeats predominance in the case.

THE COURT: Is that a live issue in the case, Mr. Kasowitz?

MR. KASOWITZ: They're waking me up. They think I'm -- they think I fell asleep, Your Honor. So he was saying I had a question.

I know.

Not to me, it's not, Your Honor. Not saying we waive the ability to argue it at some point, but I don't view it among the most important considerations that are present for, Your Honor.

THE COURT: I understand. Is there something you would like to say then in response to Mr. Walker's brief rebuttal?

MR. KASOWITZ: Yeah, a couple of things.

THE COURT: Please.

MR. KASOWITZ: Look, with respect to Singer's report and with respect to -- the whole case comes down to Singer; right? It all comes down to Singer. So the fact is

they don't have the evidence that they say they have in order to be able to establish a class-wide impact on all class members for the purpose of being able to certify a national class. So it all comes down to what Singer says. And Singer says we can look at this very small part of the country, and we can extrapolate from it. We can talk about regressions and models and everything else, but that's what he's doing. He's extrapolating from Delmarva to the rest of the country.

So how he does it is really important. And it goes to -- whatever the arguments are about whether or not his opinion should be admitted or struck, for the purpose of class certification, even if he's not disqualified, the reality is that this is not a dependable -- this is not a dependable opinion, because the most important factor, the thing that he -- that we're talking about here, which is grower pay, is the one thing that he doesn't look at in that model.

And I'm not arguing -- I understand what the plaintiffs' theory is. They say everything was suppressed. So even if it's higher, it could have been suppressed more. I get that. But there has not been one iota of an explanation, either yesterday or today, as to why Dr. Singer didn't look at overall grower pay.

If you're going to say that there's a no-poach

agreement everywhere in the country, among 21 integrators, among 147 plants, affecting 24,000-plus growers, then you would think that you would be looking at grower pay, actually, as the factor, not ten different variable constituents that may or may not influence grower pay. Grower pay.

And so what it says to me -- stripping away everything else, what it says to me is, this is a very, very weak case for class certification. It's one that ought to be denied. And if the best that they have is an example of the country where they can't demonstrate that that is representative of the entire country and of all of the variables that we would have in the country, that's an additional reason, in addition to everything else that we talked about, that it would be inappropriate for these claims to then proceed on a class-wide basis.

Because, you know, it's easy for plaintiffs to say, hey, Your Honor, we don't have to worry about that. We don't have to worry about it here. We'll do it at trial. We'll do it at trial. Respectfully, this is exactly where we need to worry about it.

THE COURT: Two points. Let me make sure I understand. First, you mean Dr. Singer didn't look at grower pay with respect to class-wide impact? He did for damages.

MR. KASOWITZ: He didn't look -- right. He didn't look at grower pay for the purpose of ascertaining whether or not he could take his -- whether or not he can take his Delmarva experience and extrapolate it to the entire country.

THE COURT: So explain to me why that is so fundamental to that analysis that it makes it unreliable. Why, in evaluating the -- not assuming that anything he said is right, but as I understand it, here's an area where the no-poach is alleged to have broken down for a period of time. I'm going to evaluate and study that space and see what happened.

And then he argues you can extrapolate the result across the country. Now, maybe you can and maybe you can't. But why does it matter what grower pay was in Texas during the period that we're studying the effect of removing the no-poach in one geographic area?

MR. KASOWITZ: Sure.

THE COURT: Why?

MR. KASOWITZ: I'm delighted to, Your Honor. It's important because the factor -- the variable he does look at, which are these different constituents, says to him, hey, there's no increase. This -- these particular coefficients are exactly the same across the entire country as they were in Delmarva. So because that's true -- and in

Delmarva, during that period of time, from 2013 to 2015, the no-poach broke down, and there was a big -- and there was a big increase, but there was no big increase -- or no change with that -- with that line for the whole period, from 2008 to 2019. Because that's true, that must mean -- this is his argument -- that must mean that a no-poach continued to be in effect that whole period of time.

If he had looked at grower pay, Your Honor, what he would have seen was not this line that says that -- that no-poach is -- continues to be in effect, what he would have seen was grower pay is going up like crazy. And it's even going up faster and more sharply than it is in Delmarva.

So what that says, Your Honor, is that for -- being able to extrapolate that there was a no-poach, a broad 50-state, no-poach agreement, affecting every single grower in the country, based on that analysis, without even looking at what grower pay really was, and considering the fact that it went up in the country, it's irresponsible, Your Honor.

THE COURT: Well, I don't think -- maybe I misunderstand. I don't think Dr. Singer is going to testify at trial that there's a 50-state, no-poach agreement -- that he's a sponsoring witness for that fact. I think he's going to assume that fact for purposes of his model and his analysis, but isn't -- what you just pointed out, isn't that two economists disagreeing about whether you controlled for

the correct variables in doing your analysis, and that --

MR. KASOWITZ: No.

THE COURT: That is a jury question.

MR. KASOWITZ: No, Your Honor, absolutely not. That is a question that goes -- respectfully, Your Honor, absolutely not that's a jury question. That's a question that shows -- the answer to which, which we still don't have; okay? -- the answer to which shows that what Dr. Singer was doing was looking for factors that would make this theory work. It's an odd theory, Your Honor. It's an -- I know Your Honor pointed out yesterday that, well, you know, you could take -- I mean, you can, as a matter of -- you know, I guess, theory or -- or statistics, take a small sample and extrapolate it to a big one. Sure, you can. Of course, you can. But then what you need to do is to make sure that that small sample is going to be appropriately and reasonably representative of what the big universe is; right? And he has purposely, I'm afraid -- respectfully, I say this -- he's purposely avoided the one most important factor to do that.

So I wouldn't be having this -- I wouldn't be having this discussion -- I've never met the man. I don't care. I wouldn't be having this discussion about him. I'm sure he's a good guy. But I wouldn't be having this discussion about him except on the basis of that one thing.

We're going to certify a national class against a company in a case where everybody else has settled, to be arguably responsible for all of these damages. It sounds like to me Your Honor -- all these alleged damages. It sounds like to me, Your Honor, that's a very, very thin reed upon which to base a national class, especially when -- especially when Pilgrim's wasn't even in Delmarva.

Now, I don't need to respond to the thing about conspiracy stuff. I get it; okay?

But those are the facts here. So it's a very, very thin reed to build this entire construct on for the purpose of then prosecuting a case in front of a jury.

Thank you, Your Honor.

THE COURT: Thank you.

Everybody who has spent much time in federal court knows that the real decision-maker usually sits about six feet away from the judge. So we're going to take a brief recess while I consult with my clerk. Stay in the courtroom, please. We're not going to be long, probably, and we'll be back and see if there's something more to cover. Thank you.

(Recess taken.)

THE COURT: Trying to be consistent when we can.

Yesterday, when taking up Pilgrim's *Daubert* motion, I asked the plaintiffs if they had -- Pilgrim's if

they had anything they wanted to add.

It's your motion on the class certification. Is there anything more from the plaintiffs to close? I don't have a specific question.

MR. WALKER: You know, Your Honor, I don't think we have anything else to add. Thank you, though, for the opportunity.

THE COURT: So we'll see each other again, by Zoom, I think, in August for a fairness hearing we have scheduled with the Sanderson settlement.

You've given us a lot to think about in these motions, and the outcome is significant, and we're hammered. And so all of that is a warning that you're not going to get a ruling from us next week. I can assure you that we take these motions and these issues seriously.

I've greatly appreciated your argument the last two days. It has really brought into focus, I think, some things that were a little unclear to me in the papers. I think I pretty clearly understand your respective positions.

And, you know, early in this case, when we got together in the courtroom downstairs, I said, from time to time -- and I just -- I want to circle back to it today, and I just want to recognize this for what it is. It is just a joy to be in a courtroom with such talented lawyers. It's

really the best experience from a judicial perspective in court when you engage in this discussion with real experts who are here to try to educate and persuade. I appreciated your briefs and I especially appreciated your argument, and I'll look forward to seeing you-all on a screen in August.

Thanks for your time. We'll be in recess.

(PROCEEDINGS CONCLUDED.)

REPORTER'S CERTIFICATE

I, Joanna Smith, Registered Professional Reporter and Certified Shorthand Reporter, in and for the State of Oklahoma, do hereby certify that the foregoing is a correct transcript from the official proceedings in the above-entitled matter.

CERTIFIED: /s/Joanna Smith

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